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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 316

THE MAY DEPARTMENT STORES COMPANY, a Corporation, Doing Business as FAMOUS-BARR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Frederick M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The May Department Stores Company, a corporation, doing business as Famous-Barr Company, respectfully shows as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case was commenced by the National Labor Relations Board (hereinafter called the Board) which filed in the United States Circuit Court of Appeals, Eighth Circuit,

pursuant to Section 10 (e) of the National Labor Relations Act [29 USC Section 160 (e)] its petition in the case numbered and entitled on the docket of said court as No. 13,468, National Labor Relations Board vs. May Department Stores Company, a corporation, d/b/a Famous-Barr Company. Said petition was for the enforcement of an order entered by the Board on the 19th day of August, 1946, against Petitioner at its department store in St. Louis, Missouri. The Board allegedly found that Petitioner had violated Sections 8 (1) and (3) of the Act and ordered Petitioner to cease and desist from the alleged conduct, to offer reinstatement with back pay to a discharged employee, and to post notices showing its compliance with the order (R1: 46-51).*

Petitioner filed its answer to the Board's petition for enforcement and alleged that the Board's order is invalid and should be set aside because the findings and conclusions upon which the order was issued are not supported by substantial evidence (R1: 90-97).

The United States Circuit Court of Appeals, Eighth Circuit, filed its opinion on June 20, 1947, enforcing the Board's order (R: 6-11).

Petitioner filed its petition for rehearing on July 3, 1947 (R: 13-27) and thereafter on July 28, 1947, the said Circuit Court of Appeals entered an order denying said petition

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* In accordance with Paragraph 7 of Rule 38 of this Court the record as printed in the court below, together with the proceedings and opinion of that court, have been filed herein. The transcript consists of a bound volume which includes: a volume filed below entitled "Record" and numbered 1, to which references will be made herein by the designation "R1" and the appropriate page numbers; a volume filed below entitled "Portions of Record Printed as an Appendix to Brief of Respondent" and numbered 2, to which references will be made by the designation "R2" and the appropriate page numbers; a volume filed below entitled "Portions of Record Printed as an Appendix to Brief of Petitioner" and numbered 3, to which references will be made by the designation "R3" and the appropriate page numbers; and the proceedings in the Circuit Court of Appeals, separately numbered, and to which references will be made by the appropriate page numbers without other designation.

for rehearing (R: 29), and on August 4, 1947, said Circuit Court of Appeals entered its decree enforcing the said order of the Board (R: 29-32).

The proceeding was instituted before the Board by the filing of a complaint on November 27, 1945 (R1: 5-7) in which it was alleged that Petitioner discharged one Marie Lee, an elevator operator, for the reason that she joined and assisted Elevator Operators and Starters, Local 50E, affiliated with Building Service Employees, International Union, AFL, and said complaint also alleged various other unfair labor practices, including anti-union statements, questioning employees, arranging dinners for employees for anti-union purposes, and surveillance of employees. All these allegations were dismissed by the Board for failure of proof, except the charges as to the discharge of Marie Lee and the making of anti-union statements (R1: 51).

After the complaint was filed by the Board the Petitioner filed a motion to make the complaint more definite and certain or for a bill of particulars (R1: 11, 12) and the Board complied in part with said motion by filing a bill of particulars in which it was alleged that the anti-union statements mentioned in the complaint were made by five named employees (R1: 14). However, the Board made no finding based on any alleged anti-union statements by any of those five named persons. The alleged anti-union statements on which the Board's order is based are claimed to have been made by the elevator supervisor, Myrtle Frazer Winfield (R1: 47), who was not named as to such anti-union statements in the bill of particulars.

The findings of the Board are stated as follows:

> "We agree with the Trial Examiner that the respondent has engaged in unfair labor practices within the meaning of Section 8 (1) of the Act. In so find-

> ing, however, we rely only upon the conduct of supervisor Winfield in making anti-union statements to Marie Lee and to other employees and in threatening Lee with discharge for her union activities, and upon the respondent's discriminatory discharge of Lee" (R1: 47).

As to the discharge of Marie Lee, the Board made no separate finding, but adopted (R1: 47) the finding of the Trial Examiner, which is as follows:

> "The undersigned finds that the respondent discharged Marie Lee on the basis of prejudiced reports of supervisory employees and because of her union activities and by such conduct has discriminated in regard to her hire and tenure of employment, thereby discouraging membership in the union and interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act" (R1: 78).

In the court below Petitioner challenged these findings and the Board's order based thereon, for the reason that they are not supported by substantial evidence (R: 8). As to the alleged anti-union statements and threats by Winfield, the Board relied only upon the testimony of Lee that in 1943, as Lee and Winfield passed each other in a doorway, and without any preliminary remarks or any reply, Winfield said that Lee was going to keep on fooling around with the union until she got fired; and once in a regular morning assembly of all the elevator operators and starters between May 22 and May 25, 1945, Winfield quoted a speaker as saying that unions were not for colored people; and on May 25, 1945, in an elevator on the 9th floor of the store Winfield either did or did not (it is difficult to determine which versions of Lee's testimony the Board chose to believe) refer to Lee's union activities (R1: 56-59). As stated above, Winfield was not named in the bill of particulars in connection with the charge of anti-union state-

ments or threats, and the claims made at the hearing must have been an after-thought by Lee unknown to the Board when the bill of particulars was filed. Although seven of Lee's co-workers testified as witnesses for the Board, there is not one word of testimony by any of them that she had ever heard Winfield even mention the union or union activities (R2: 88-114). As to the discharge of Lee, the Board relied on Lee's denials that she had engaged in the conduct for which she was discharged, namely, insubordination, disobedience and repeatedly violating store rules, which denials the Board credited and thereupon found that her discharge was discriminatory (R1: 71-78). Hence it is apparent that the Board's findings and order are based entirely on the uncorroborated testimony of Marie Lee. In several instances the Board was forced to admit that the testimony of Lee could not be credited, but in each case it gave a wholly inadequate reason for failing to find that Lee's testimony, given in her own self-interest, was completely discredited (R1: 59, 61, 75).

In the court below Petitioner contended that the testimony of Lee, which is filled with self-contradictions and obvious falsehoods, as well as being contrary to physical facts and documentary evidence, is, on its face, so completely incredible as to be worthless and to amount to no evidence at all (R: 8, 9).

The Court failed completely to decide whether or not the order of the Board was based upon substantial evidence but deemed that question as immaterial, and with obvious reluctance held:

> "The findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different" (R: 11).

II.

JURISDICTION.

The basis upon which it is contended that this Court has jurisdiction to review the decision and decree in question is as follows:

Section 240 of the Judicial Code, as amended, 28 USC Section 347, provides that in any case in a circuit court of appeals it shall be competent for this Court, upon the petition of any party thereto, to require by certiorari that the cause be certified to this Court for determination here with the same power and authority, and with like effect, as if the cause had been brought here by an unrestricted writ of error or appeal.

Section 10 (e) of the National Labor Relations Act, 29 USC Section 160 (e), provides that the Board shall have power to petition any circuit court of appeals within any circuit wherein the respondent transacts business for the enforcement of its orders entered as provided in Section 10 of said Act and that jurisdiction of the circuit court of appeals shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by this Court upon writ of certiorari or certification.

The decree of the United States Circuit Court of Appeals, Eighth Circuit, sought to be reviewed here, was entered on the 4th day of August, 1947 (R: 29).

III.

THE QUESTIONS PRESENTED.

(1) Whether or not "the findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different", even in a case

where the findings of the Board are not supported by substantial evidence.

(2) Whether or not the court below was required by the Administrative Procedure Act to make a determination from the whole record, or such portions thereof as were cited by the parties, upon the contention that the findings of the Board are not supported by substantial evidence.

(3) Whether or not the findings of the Board upon issues of fact are conclusive on review where they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable on its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence.

IV.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Circuit Court of Appeals below is in conflict with the controlling decisions of this Court in the cases of **Consolidated Edison Company v. National Labor Relations Board**, 305 U. S. 197, 229; and **National Labor Relations Board v. Columbian Enameling and Stamping Company, Inc.**, 306 U. S. 292, 299, in that the court below held that findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different, and regardless of whether or not the findings are supported by substantial evidence.

(2) The decision of the Circuit Court of Appeals below is in conflict with the express terms of Section 10 (e) of the **National Labor Relations Act**, 29 USC Section 160 (e),

in that the court below held that the findings of the Board upon issues of fact are conclusive upon review, regardless of whether or not said findings are supported by substantial evidence.

(3) The decision of the Circuit Court of Appeals below is in conflict with the express terms of the **Administrative Procedure Act** of June 11, 1946, 5 USC 1001-1011, in that the Court below failed to make a determination from the whole record upon the Petitioner's contention that the findings of the Board are not supported by substantial evidence, but the Court below held that the findings of the Board upon issues of fact are conclusive upon review, regardless of whether or not said findings are supported by substantial evidence.

(4) The decision of the Circuit Court of Appeals below is in conflict with the decisions of other circuit courts of appeals in the cases of **National Labor Relations Board v. Sun Shipbuilding and Dry Dock Co.**, Third Circuit, 135 F. 2d 15, 25; **Loveman, Joseph and Loeb v. National Labor Relations Board**, Fifth Circuit, 146 F. 2d 769, 772; **National Labor Relations Board v. Brown Brockmeyer Co.**, Sixth Circuit, 143 F. 2d 537, 542, and **National Labor Relations Board v. Reeves Rubber Co.**, Ninth Circuit, 153 F. 2d 340, 342; in that the court below held that the findings of the Board upon issues of fact are conclusive upon review where they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable upon its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence.

The decision of the court below thus raises questions of public importance in the orderly administration of the **National Labor Relations Act** and the application of the

principles enunciated by this Court for the effectuation of the mandate of the Act. And the decision of the court below is in conflict with the **Administrative Procedure Act** of June 11, 1946, which was in effect during all the time while this case was pending in the court below, and which is now of even greater public importance because provisions similar thereto have been incorporated into the **National Labor Relations Act** by the amendments contained in the **Labor Management Relations Act, 1947,** enacted June 23, 1947. And the decision of the court below is in conflict with decisions of other circuit courts of appeals.

Wherefore, your Petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals, Eighth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said circuit court of appeals in the case numbered and entitled on its docket as No. 13468, National Labor Relations Board, Petitioner, v. May Department Stores Company, a Corporation, d/b/a Famous-Barr Company, Respondent, to the end that this case may be reviewed and determined by this Court, as provided by the Statutes of the United States; and for such other and further relief as to this Court may seem proper.

Dated: September 2, 1947.

Respectfully submitted,

THE MAY DEPARTMENT STORES COMPANY,

By MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.

IN THE

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THE MAY DEPARTMENT STORES COMPANY, a Corporation, Doing Business as FAMOUS-BARR COMPANY,
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NATIONAL LABOR RELATIONS BOARD.

BRIEF

In Support of Petition for Writ of Certiorari.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, Eighth Circuit, appears in the Transcript of the Record, pages 6 to 11, inclusive. The opinion is reported at 162 F. 2d 247.

II.

JURISDICTION.

The Court's jurisdiction is invoked pursuant to the provisions of Section 240 of the **Judicial Code** as amended (28 USC, Sec. 347) and Section 10 (e) of the **National Labor Relations Act**, as amended (29 USC, Sec. 160 [e]). The date of the decree entered by the court below is August 4, 1947 (R: 29).

III.

STATEMENT OF THE CASE.

A statement of the case appears in the foregoing petition, which statement is hereby adopted and by reference made a part of this brief as a statement of the case.

IV.

SPECIFICATIONS OF ERRORS.

(1) The court erred in enforcing the Board's order, and erred in enforcing each and every provision contained in said order.

(2) The court erred in holding that "the findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different," where the findings of the Board are not supported by substantial evidence.

(3) The court erred in failing to make a determination from the whole record upon the contention that the findings of the Board are not supported by substantial evidence.

(4) The court erred in holding that the findings of the Board on issues of fact are conclusive on review, where they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable on its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence.

(5) The court erred in failing to set aside the Board's order, and each and every provision contained in said order.

V.

SUMMARY OF ARGUMENT.

(A) The findings of the Board upon issues of fact are conclusive on review only if they are supported by substantial evidence as determined upon a review of the whole record, or such portions thereof as are cited by the parties, but the court below in this case erroneously assumed that the findings of the Board were conclusive on review regardless of whether or not they are supported by substantial evidence, and without regard to the record as a whole.

(B) The findings of the Board upon issues of fact are not conclusive on review where, as in this case, they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable on its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence.

VI.

ARGUMENT.

A.

The Findings of the Board Upon Issues of Fact Are Conclusive on Review Only if They Are Supported by Substantial Evidence as Determined Upon a Review of the Whole Record, or Such Portions Thereof as Are Cited by the Parties, but the Court Below in This Case Erroneously Assumed That the Findings of the Board Were Conclusive on Review Regardless of Whether or Not They Are Supported by Substantial Evidence, and Without Regard to the Record as a Whole.

The Court below erroneously held that regardless of whether or not there was substantial evidence in the record to support the findings of the Board, nevertheless, "the findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different" (R: 11).

The National Labor Relations Act (before the amendment of June 23, 1947) provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive" [29 USC, Sec. 160 (e)].

In the case of **Consolidated Edison Co. v. National Labor Relations Board,** 305 U. S. 197, 229, this Court said:

> "The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. **We agree that the statute, in providing that 'the findings of the Board as to the facts, if**

> **supported by evidence, shall be conclusive,' means supported by substantial evidence.** Washington, V. & M. Coach Co. v. National Labor Relations Bd., 301 U. S. 142, 147, 81 L. ed. 965, 970, 57 S. Ct. 648. **Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.** Appalachian Electric Power Co. v. National Labor Relations Bd. (C. C. A. 4th), 93 F. (2d) 985, 989; National Labor Relations Bd. v. Thompson Products (C. C. A. 6th), 97 F. (2d) 13, 15; Ballston-Stillwater Knitting Co. v. National Labor Relations Bd. (C. C. A. 2d), 98 F. (2d) 758, 760." (Emphasis supplied.)

And in the case of **National Labor Relations Board v. Columbian Enameling & Stamping Company**, 306 U. S. 292, this Court said:

> "Section 10 (e) of the Act provides: '. . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Washington, V. & M. Coach Co. v. National Labor Relations Bd., 301 U. S. 142, 81 L. ed. 965, 57 S. Ct. 648; **Consolidated Edison Co. v. National Labor Relations Bd.**, decided December 5, 1938 (305 U. S. 197, 59 S. Ct. 206); Appalachian Electric Power Co. v. National Labor Relations Bd. (C. C. A. 4th), 93 F. (2d) 985, 989; National Labor Relations Bd. v. Thompson Products (C. C. A. 6th), 97 F. (2d) 13; Ballston-Stillwater Knitting Co. v. National Labor Relations Bd. (C. C. A. 2d), 98 F. (2d) 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established."

On June 11, 1946, Congress enacted the **Administrative Procedure Act** (5 USC 1001-1011). Section 10 (e) of that Act [5 USC 1009 (e)] provides:

"(e) **So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law,** interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. **It shall** (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) **hold unlawful and set aside agency action, findings, and conclusions found to be** (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) **unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute;** or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. **In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party,** and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, §10, 60 Stat. 243." (Emphasis supplied.)

That section of the **Administrative Procedure Act** became effective September 11, 1946 (three months after the date of approval of the act [5 USC 1011]) which was before the petition in this case was filed in the court below on December 6, 1946 (R1: 85).

Under the **National Labor Relations Act** as construed by this Court, findings of the Board are conclusive on review only if they are supported by substantial evidence. Under the **Administrative Procedure Act,** the Court below was required to review the whole record presented to it and set aside any Board findings "unsupported by substantial evidence," as determined by the court from such review of the record.

In the Court below Petitioner alleged in its answer (R1: 90-97) and contended before the Court that "the findings of the Board are without adequate evidentiary support" (R: 8). That was the sole issue presented to the Court below. Nevertheless the Court below in its opinion failed completely to determine whether or not the findings of the Board were unsupported by substantial evidence. It must be presumed that the Court below reviewed the record in this case, as it was required to do by the decisions of this Court quoted above, and the Court's inability to find in the record substantial evidence to support the Board's findings is apparent on the face of the opinion, for the opinion contains no statement that the Court below believed that the Board's findings are supported by substantial evidence. Where the issue was presented squarely to the Court below, as the sole issue in the case, the failure of the Court to make any statement of its determination that the findings of the Board are or are not supported by the evidence is not only a violation of the **Administrative Procedure Act**, but, is a positive indication that the Court below was unable to find in the record substantial evidence which would support the Board's findings.

The opinion of the Court below held that regardless of whether or not the Board's findings are supported by the evidence, nevertheless, those findings are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different. That opinion is clearly in conflict with the controlling decisions of this Court in the **Consolidated Edison Company** case and the **Columbian E. & S. Company** case and is in direct conflict with the **Administrative Procedure Act**. The conflict with the **Administrative Procedure Act** is now a matter of unusual public interest because the provisions emphasized in the above quotation

from that act have now been incorporated into the **National Labor Relations Act** by the amendments thereto contained in the **Labor Management Relations Act, 1947.** Obviously it was the intent of Congress in the enactment of those two acts to prevent reviewing courts from assuming, as the court below did in this case, that findings of the Board are conclusive on review regardless of whether or not the findings are supported by substantial evidence. Those acts require that the reviewing court shall review the whole record, or such portions thereof as shall be cited by the parties, and they require that the reviewing court shall make a **determination** as to whether or not the findings of the administrative agency are supported by substantial evidence, and unless the reviewing court upon such review can make a determination that the findings are supported by substantial evidence, the reviewing court is required to set aside the agency action, findings and conclusions.

This case was decided before the enactment of the **Labor Management Relations Act, 1947**, but the **Administrative Procedure Act** was effective before the petition in this case was filed in the court below. Therefore the duties imposed upon the reviewing court by the **Labor Management Relations Act, 1947**, which is now a matter of unusual public interest, were imposed upon the court below in this case by the **Administrative Procedure Act**, enacted June 11, 1946. The decision of the court below that the findings of the Board are conclusive on review regardless of whether or not they are supported by substantial evidence—in conflict with the controlling decisions of this Court, and without any determination of the question from the record as a whole as required by the **Administrative Procedure Act**—is a matter of public importance and should be reviewed by this Court.

B.

The Findings of the Board Upon Issues of Fact Are Not Conclusive on Review Where, as in This Case, They Are Supported Only by the Uncorroborated Testimony of an Interested Witness Which Is so Self-Impeached, so Improbable on Its Face, and so Inconsistent, That a Reasonable Mind Could Not Accept It as Adequate to Support a Conclusion and Which, Therefore, Does Not Constitute Substantial Evidence.

This is a case where an employee was discharged for insubordination. The employee was an active member of a union, and that fact was known by the employer—and there the proof as to alleged discriminatory discharge stops. There is not in this case the additional claim of antipathy for the union by the employer, which, even if present, would not be sufficient to constitute substantial evidence of discrimination. **N. L. R. B. v. Goodyear T. & R. Co.**, 5th Cir., 129 F. 2d 661, 667. In its complaint the Board alleged all manner of unfair labor practices by the employer against the union, but all these charges disappeared from the case and were held by the Board itself to have been unfounded, so that there was left in the case only the claim that certain anti-union statements were made by the employee's supervisor, and that the employee was discriminatorily discharged.

The Board's Trial Examiner in his intermediate report took occasion to say that his findings were not based upon the contention by the Board that prior cases establish " 'a long proven background of anti-union conduct' indicating a 'pattern of coercive conduct' which was carried further by the acts alleged in the instant case," except that the prior cases "tend to corroborate the findings in the instant case" (R1: 79). The two prior cases cited, one of which reached this Court, **N. L. R. B. v. May Dept. Stores Co.**,

8th Cir., 146 F. 2d 66, modified and, as modified, affirmed 326 U. S. 376, and **N. L. R. B. v. May Dept. Stores Co.**, 8th Cir., 154 F. 2d 533, both involved a CIO union, and in the latter case it was held that the Petitioner had discriminated against the CIO **in favor of the AFL.** Certainly there could be no sound contention made that these prior cases establish any antipathy by this Petitioner **against the AFL,** and there is not in this case any evidence of any kind to indicate any such antipathy. The Board's own decision is proof of this (R1: 46-51).

There was left, therefore, for the consideration of the court below only the question of whether or not the Board's findings—that the discharged employee's supervisor made anti-union statements and that the discharge was discriminatory—are supported by substantial evidence. No scintilla of evidence to support those findings could be found in the record, except in the testimony of the discharged employee and her testimony which was given in her own self-interest is so vague, incoherent, confused, self-impeached and obviously false that it does not amount to substantial evidence. Nevertheless, the court below held, with obvious reluctance, that the findings of the Board were conclusive on review.

The Board made no separate findings as to the alleged anti-union statements by the supervisor, or as to the alleged discriminatory discharge, but the Board merely adopted the findings of the Trial Examiner, which in turn are based on the testimony of Marie Lee, the discharged employee, who was an elevator operator. On three points, the Trial Examiner found it completely impossible to credit Lee's testimony. He did not, however, expressly discredit her. Instead, on one occasion, he excused her testimony by his own presumption of "her failure to understand certain questions" (R1: 59). In the second instance, the Trial Examiner found himself unable

to credit Lee because of a sharp conflict between her testimony and a physical fact. He refused to discredit Lee, however. Instead, he merely found that the evidence was insufficient to support a finding consistent with Lee's testimony (R1: 61). The third instance involved a conflict between the testimony of Lee and that of the personnel manager, McCarthy, concerning Lee's work assignments during a certain period. McCarthy's testimony on the point was given with the aid of a memorandum prepared at McCarthy's direction from the original records of work assignments. The Board's attorney at first objected to the use of this memorandum but when the manner in which it was prepared had been established by the record, the Board's attorney withdrew his objection and McCarthy testified with the aid of the memorandum (R2: 174). It would seem, therefore, that McCarthy's testimony on the point reflects the true state of the facts and discredits Lee's conflicting testimony. The Trial Examiner, when considering this evidence, contents himself with the finding that:

> "• • • there is no proof that the various assignments Mrs. Lee received were made other than for the purpose of maintaining operations" (R1: 75).

He refused, however, to consider McCarthy's undeniably credible testimony on the point as having any bearing upon Lee's credibility as a witness. Instead, he summarily dismissed the matter insofar as credibility of the witnesses is concerned.

Thus, the Trial Examiner and the Board credited Lee's testimony wherever they supposed it possible for them to do so; but whenever it was utterly impossible for them to credit her, they excused the nature of Lee's testimony as the result of "her failure to understand certain questions" (R1: 59), or they disregarded her testimony on the ground that all the evidence on the point failed to

prove an unfair labor practice or was insufficient to support a finding either way as to an unfair labor practice.

In the case of **N. L. R. B. v. Sun Shipbuilding and Dry Dock Company**, 3 Cir., 135 F. 2d 15, 25, the Court refused to accept as conclusive the Board's findings which rested upon the testimony of one Campbell who, like Lee in the instant case, deliberately testified falsely to a number of incidents and then on further examination contradicted and impeached his own testimony. The Board chose to believe and based its findings upon portions of Campbell's testimony just as in this case the Board chose to believe and based its findings upon portions of Lee's testimony. The Third Circuit Court of Appeals said:

> "While it is for the Board, therefore, to find the facts and to draw material inferences from the evidence (National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261, 271, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307), **it is for a reviewing court to say whether the Board's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence which it accredits.** Guided by these standards, it is our opinion that the Board's findings of unfair labor practices on the part of the respondent are not supported by substantial evidence.
>
> "In reviewing the evidence upon which the Board relies for its findings it is also necessary for us to keep in mind that it is the province of the Board, as the fact-finder, to resolve the conflicts in the testimony and to appraise the credibility of the witnesses. See National Labor Relations Board v. Condenser Corporation of America, supra, 3 Cir., 128 F. 2d, at p. 78. **However, in determining whether the evidence which the Board accredits is such 'as a reasonable mind might accept as adequate to support a conclusion,' it is not wholly without significance that the integrity of the principal witness relied upon by the Board was self-impeached, that he had a bias or interest to serve**

for which both the Examiner and the Board felt constrained to make allowance in appraising his testimony, and that the Board itself disregarded material portions of his testimony on certain issues where directly refuted.'' (Emphasis supplied.)

In the case of **Loveman, Joseph & Loeb v. N. L. R. B.**, 5 Cir., 146 F. 2d 769, 772, the Court said:

> ''The finding that Mrs. Burkett was discharged for union activities is not supported by substantial evidence, and the order to reinstate her and to make her whole for any losses which she might have sustained will not be enforced.
>
> **''We cannot support the Examiner and the Board in cleaving only to the testimony of a witness who was clearly shown to be collecting unemployment compensation under a false claim, and whose testimony was so definitely impeached in several particulars by a number of witnesses who clearly appear to be disinterested.''** (Emphasis supplied.)

In the case of **N. L. R. B. v. Brown-Brockmeyer**, 6 Cir., 143 F. 2d 537, 542, the Court refused to accept as conclusive the findings of the Board based upon the testimony of one Pearl James which contained inconsistent statements and which the Court held not to amount to substantial evidence to support the findings of the Board.

In the case of **N. L. R. B. v. Reeves Rubber Co.**, 9 Cir., 153 F. 2d 340, 342, the Court said:

> ''In the instant case there is quantity enough of relevant and competent evidence, if believed, to support the Board's findings. The Board's findings are conclusive to the effect that it did believe such evidence. **Unless the evidence is so improbable upon its face as to negative belief or so inconsistent as to destroy its credence, no error of law can be decreed by this reviewing court.''** (Emphasis supplied.)

Thus, the decision of the court below—that findings of the Board are conclusive on review, even where they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable on its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence—is in direct conflict with the decisions of other circuit courts of appeals.

Lee's total disregard for the truth and her almost unbelievably calloused capacity to vary her testimony as the supposed need of the moment seemed to dictate are best seen by a comparison of various parts of her testimony regarding a single incident. We have tried to make the following excerpts from Lee's testimony brief enough to lessen the burden of reading them; and we have tried to make them lengthy enough to avoid any unfair coloring of the testimony. We have not set forth all Lee's self-contradictions. To do so would require the reprinting of almost all her testimony. The testimony itself so clearly bespeaks its own falsity that explanation is scarcely necessary. The emphasized portions of the following excerpts point up the self-contradictions. For example:

Lee's testimony concerning alleged anti-union remarks of Myrtle Frazier* Winfield in 1943:

Direct Examination.

"Q. (By Mr. Carlson) During the **Spring of 1943** did Mrs. Winfield say anything to you about the union?

A. Yes, she did.

Q. What was it?

• • • • • • •

* Winfield was sometimes referred to in the testimony as Miss Frazier.

A. Well, she told me that I was going to keep on fooling around with the union until I got fired.

Q. (By Mr. Carlson) Whereabouts did that conversation take place?

A. Just outside of the locker room on the thirteenth floor.

Q. Can you fix the time?

A. I don't know the exact time. **It was in the afternoon.**

Q. About the date, approximately.

A. **It was just before the first election.**

Trial Examiner Feiler: Can you give us the month?

A. No, I can't give you the month. I don't remember the month, just what month it was, but I know it was just before the first election was held.

Mr. Carlson: **It will be stipulated that the date of the first election was in January, 1944.**

Trial Examiner Feiler: Next question.

By Mr. Carlson: The specific date being January 28.

Trial Examiner Feiler: January 28, 1944.

Q. (By Mr. Carlson) About how long before the election in January, '44, was this conversation?

A. I would say it was about a month and a half, approximately" (R2: 5).

Cross-Examination.

"Q. You testified about a month and a half before the election on January 28, 1944, that Mrs. Winfield said to you that you were going to keep on fooling around with the union until you got fired. Where did that conversation take place?

A. On the thirteenth floor, right outside of the locker room.

Q. At what time of day was it?

A. **It was around noontime."**

"Q. What was said before that?

A. **There wasn't anything said before that.**

Q. That is all she said?

A. That is all she said before she said that.

Q. Where were you—were you going some place at that time or coming from some place?

A. Coming out of the locker room.

Q. Was she going in, or where was she?

A. I could not tell you where she was going, but she met me right outside of the locker room there. I could not say where she was going.

Q. **That is all she said?**

A. **Yes, sir, that is all she said.**

Q. What did you say then?

A. **I did not say anything to her.**

Q. That is all there was to the conversation?

A. **That is all there was to the conversation"** (R2: 42, 43).

* * * * * * *

"Q. What was she bawling you out about then?

A. Now that I don't know because **just out of a clear blue sky she came up and told me that"** (R2: 63).

Winfield denied specifically that she had any such conversation as that which Lee attributed to her. She further denied that she ever at any time mentioned the Union to Lee (R2: 117). Moreover, no other employee who testified in the case had ever at any time heard Winfield make any remark of any kind relating to the Union or the Union activity of any of the employees. Even if Lee had been a credible witness, generally, which she certainly was not, and even disregarding her self-contradictions as to the date and the time of day, it would be impossible to believe that these two women met on the thirteenth floor as one of them was coming out of the locker room, and with no other discussion at all Winfield said to Lee that she was going to keep on fooling around with the Union until she got fired. It is preposterous that such a statement would be made with nothing to introduce it or provoke it and with no reply or other comment. Yet the Trial Examiner and the Board believed it and based an unfair labor practice finding, at least in part, upon it (R1: 47, 57).

Lee's testimony concerning alleged anti-union remarks of Winfield at assembly:

Direct Examination.

"Q. Did you ever hear Forelady Winfield refer to the Union at any subsequent time to this date on which you talked to her on the elevator?

A. What do you mean, talk about the Union in any way?

Q. Yes.

A. To me?

Q. Or to other elevator operators?

A. Yes, once before in assembly.

Q. (By Mr. Carlson) Yes, now what assembly, to what assembly do you refer?

A. The assembly that we have on the thirteenth floor in the rest room before going to our work, before going to our elevators.

Q. You mean assembly of the elevator operators?

A. **Assembly of the elevator operators and starters, the whole group; we assemble on the thirteenth floor in the rest room.**

Q. Do you do that every day?

A. Every morning.

Q. Before going to work?

A. Yes, before going to work.

* * * * * * *

Q. Tell us what was said.

A. Well, she said that she had been to a meeting that night. I don't just recall where it was, but at this meeting was a colored fellow from the Peace Conference in San Francisco and he was making a speech and he was talking about how easy our people are to be (lead) the wrong way, and said that what we ought to do is to get a good grip on ourselves and try to think before we leap because usually with our people it is the wrong way we leap instead of the right way. He said we could be so easily (lead), and she said that he also said that Unions wasn't for colored people, they did not do colored people any good at all

and we should let them alone. When she said that all of the girls looked at me.

Q. Anything further?

A. No, that is about all.

Q. That you recall that Floorlady Winfield said?

A. Yes.

Q. **Did any of the girls talk to you about it after the speech?**

A. **Well, various ones. They said that was terrible. Said we all understood that very clearly that she was hitting at you, you know when she was talking about our people was so easily (lead) that one could get the wrong impression of things and carry it on and the rest would follow, said I know she was hitting at you because she made it plain enough, and really they think she was making that up within herself"** (R2: 11-13).

Cross-Examination.

"Q. You testified that sometime between May 21 and May 25 Miss Frazier mentioned having heard a speech by a man who had been at the San Francisco Peace Conference, and that after that several of the girls said to you she was hitting at you. Which girl said that?

A. I could not just say which one said it.

Q. Was it any particular one that said that?

A. I don't remember. **None of them spoke to me about it"** (R2: 45).

Lee gave all the details of these conversations on direct examination, and then on cross-examination she denied that she had any such conversation. Of necessity, Lee had to be giving false testimony either when she related the substance of these conversations or when she later testified that she had no such discussions. If she had the conversations, why did she testify that she did not have them? If it is true that the conversations did not occur, then the individual who sits on the witness stand under

oath and spins a yarn about the substance of fictitious conversations, as did Lee, certainly destroys the value of all her testimony.

Although seven of Lee's co-workers testified as witnesses for the Board in this case, no other employee claims to have heard Winfield mention a union at the assembly or at any other time. If any statement as that attributed to Winfield by Lee had actually been made, then certainly the Board's other witnesses who were Lee's co-workers and present with Lee at the assembly would have heard it. Winfield testified that she had attended a meeting at which she heard the speech of a man who had been at the San Francisco Conference. She fixed the time as being during the Conference, which began in April, and she testified that she did mention to the girls that she had heard this speaker and was impressed by him, but she testified that the speaker said nothing whatever about a union; that she, when discussing the matter, said nothing to the girls about a union (R2: 118-119).

The Trial Examiner made no mention of the fact that Lee's testimony is uncorroborated by other witnesses who were present when the remarks are supposed to have been made. He disposed of Winfield's denial by merely mentioning it (R1: 57). Then, in a footnote, the Trial Examiner said:

> " [10] As to the incident at the assembly, Mrs. Lee gave contradictory testimony as to whether she later discussed Mrs. Winfield's remarks with other employees. However, the undersigned concludes that inconsistencies in her testimony were due primarily to her failure to understand certain questions. The undersigned, from a study of Mrs. Lee's testimony, concludes that it was truthful and consistent with the actual background herein, and her testimony has therefore been credited" (R1: 59).

What are the questions which Lee is supposed to have misunderstood, resulting in "inconsistencies in her testimony"? The question of the Board's attorney which led Lee to describe the conversations in detail was simply, "**Did any of the girls talk to you about it after the speech?**" She answered that various girls talked to her about it. On cross-examination, counsel briefly summarized Lee's testimony concerning the substance of the conversations, and then asked, "**Which girl said that?**" Lee then contradicted her previous testimony, as follows:

> "A. **I could not just say which one said it.**
> Q. Was it any particular one that said that?
> A. I don't remember. **None of them spoke to me about it.**"

The questions were just as plain and understandable as the English language permits. Moreover, Lee never indicated, either directly or by implication, that she misunderstood the questions. The Trial Examiner's conclusion that she did is actually his own unwarranted presumption which finds absolutely no support in the record. What is the "actual background herein" with which Lee's self-contradicted testimony is consistent? It could not be the fact that no other employee had ever heard Winfield mention a union or union activities? How anyone can credit Lee's testimony concerning this incident is beyond comprehension. Yet the Trial Examiner and the Board credited it and based an unfair labor practice finding, at least in part, upon it. Note that in the Board's Decision it is said that the order is based in part on the finding that Winfield made anti-union statements to Lee "**and to other employees**" (R1: 47). The story of the assembly incident in Lee's testimony is the only claim in the entire record of any alleged mention of the union by Winfield "to other employees."

Lee's testimony concerning alleged anti-union remarks of Winfield at the time of the ninth floor glove incident:

Direct Examination.

"Q. (By Mr. Carlson) Did you have any further conversation with Mrs. Winfield, Forelady Winfield, with respect to the union after the conversation that you related previously?

A. Yes, I did.

* * * * * * *

Q. Will you relate the conversation?

A. I had got permission from the starter on this particular day, which was May 25, 1945——

Q. That was the day of the conversation?

A. Yes, the day of the conversation. I had gotten permission from the starter to go up to the ninth floor to try on a pair of gloves to operate in, which was given to me by one of the cashiers. And while I was **standing on this floor Miss Frazier** came up on the next car to mine and asked me what I was doing and I told her **I was trying to find a pair of gloves to fit** me to operate in because it is very necessary that we **have gloves to operate. She told me didn't I know that was against the rules, and I told her that** I got permission from the starter because I really needed the gloves to work. So she says, 'Well, anyhow I have something to talk over with you,' and I said, 'All **right, what is it?' So she says, 'You** have been here a long time.' And she said, 'I am the only one that is keeping you here. If you don't know it.' I said, 'You are?' And she said, 'Yes.' **And she told me that if I did not quit fooling around with these Unions that I was going to be out of a job because the union did not do me any good, and she didn't see any reason why I should keep on fooling around with them. And she also said that she thought I was really more intelligent than that.** She said the Company couldn't pay her enough money to sell out her people. And she also said that she knew enough on me to get me fired. So I asked her, 'Well, what do you know on

me? That you could get me fired?' And I said, 'I am not doing anything other than organizing for the Union.' I said, 'What do you know that I have done as bad as all that that I would get fired?' She said, 'Oh, I won't go into the details, but you heed my warning.'

Q. How long did she talk to you?

A. Well, she talked with me about forty-five minutes.

Q. Anything further at that time?

A. Well, she told me that since I had taken Miss Johnson up to the Labor Relations Board, the voting place where we had the War Man Power Commission, since I had taken her up there that she couldn't handle her any more and told me I had better tell her she was the one that was in charge and not me.

* * * * * * *

Q. (By Mr. Carlson) Is there anything further about Alma Johnson? How did that subject come up?

A. Well, after she got to talking with me about myself and the Union then she brought up this Miss Johnson. She said that Miss Johnson wouldn't (not) pay any attention to what she told her at all, and I told her then I don't see any reason why because she knows you are supervisor, you are over me as well as she" (R2: 8-10).

Cross-Examination.

"Q. Did Mrs. Frazier bawl you out then for standing there?

A. No, she didn't bawl me out for standing there.

* * * * * * *

Q. Did she give you any warning about what you had better do?

A. No, she didn't. Only warning that she gave me about what I had better do was about the Union.

Q. What did she say about that?

A. About the Union?

Q. Yes.

A. **Well, she told me that it wasn't any good for me, she didn't see why I kept on fooling around with it, and the Union was not for colored people.**

Q. Was that a warning? Is that all she said?

A. That is all she said as far as a warning is concerned, and about she was keeping me there and if I didn't watch my step I would get fired.

Q. Now you testified that she said that a way back sometime on the thirteenth floor, is that right?

A. Yes, she said that on the thirteenth floor outside the locker rooms, too.

Q. Did she say the same thing on this occasion?

A. She didn't say the same thing on that occasion, but the way she put it I figured she meant the same thing.

Q. What did she say?

A. Well, when she said she had enough on me to get me fired I knew she didn't know anything on me other than that I was affiliated with the Union.

Q. **She didn't say anything about the Union herself, did she?**

A. **She didn't mention Union right then, no.**

Q. You thought that was what she meant, is that it?

A. Sure.

Q. Well, up on the thirteenth floor did she say anything about the Union or did you just think she meant it then?

A. No, she came right out with the word Union.

Q. **Is that the only time she used the word Union?**

A. **Yes, that is the only time I know of when she was speaking directly to me, but another time she used the word Union was when she made that little talk in the rest room on the thirteenth floor.**

Q. She was telling you what some man had said at a meeting?

A. Yes, what this colored fellow had said that was supposed to have come from the Peace Conference" (R2: 66-68).

Redirect Examination.

"Trial Examiner Feiler: She told you about the Union in that particular conversation?

A. **No, she didn't talk about the Union. The only thing she said about the Union as I can remember was when she told me to speak to Miss Johnson** and tell Miss Johnson that she was the boss and she had to listen to her and not to me, said because since she was over at that election with me as an observer for the Union she was kind of hard to handle. I told her then I didn't see why she would take that attitude because she knows you are the supervisor and not me. But I said, 'If you wish me to I will speak to her.' But I told her I thought she would do it.

Trial Examiner Feiler: **Then it is correct to say that the only times you heard Mrs. Winfield mention the Union or Union matters was on the occasion in 1943 and also at the time of the Assembly which you testified to, is that correct?**

A. **That is correct.**

Trial Examiner Feiler: You didn't hear her mention it other times?

A. Not to me.

Trial Examiner Feiler: Not to you or in your hearing, is that right?

A. No, not to me.

Trial Examiner Feiler: All right" (R2: 70).

Thus, Lee four times said that Winfield mentioned the Union and Lee's union activities during this conversation and she gave details of what Winfield said about the Union. And then four times she said that Winfield did not mention the Union during that conversation except with reference to Alma Johnson's having been an observer for the Union at the Board conducted election. Which of Lee's statements are true? Who can honestly say that any of them are true? Who would rely on the statements of such a witness in the conduct of his own affairs? Yet this was the testimony upon which the Board based its order.

Lee's testimony as to receiving old gloves from the cashiers:

Cross-Examination.

"Q. And now what happened then?

A. I was standing in my elevator with my doors closed and my lights were on.

Q. What did she say?

A. She looked in and asked me what was I doing. I opened the door and told her I had the bag of gloves in my hand, and I said, 'I am trying on some gloves to see if I can find some in here to fit me to operate in.'

Q. Where did you get this bag of gloves?

A. The cashier in the basement.

Q. She gave you a whole bag of them?

A. Yes, she gave me a whole bag of old gloves. It is gloves that customers or somebody left, usually one of one kind and one of another like that. If we can get a pair to fit our hands out of that bag all well and good" (R2: 66).

* * * * * * *

"Q. When did you get the gloves? What time of the day?

A. I don't know. It was just before I went up to the ninth floor, it was around that time.

Q. You had to leave your elevator to go get them, did you?

A. No, I didn't. A girl handed them to me.

Q. The girl brought them to you?

A. Yes, she did.

Q. And had you asked her for them before?

A. No, I hadn't asked for any. Those girls in those cashier desks there, they make it a rule you might say to give the girls gloves. **I had any number of them to give me gloves,** old gloves like that if nobody came back and claimed them in a certain length of time they gave them to the operators.

Q. Did you always go up on the ninth floor to try them on?

A. **That was the first time I got any.**

Q. **That was the first time you got any?**

A. Yes.
Mr. Burch: That is all" (R2: 68, 69).

Note Lee's statement that "any number" of cashiers had given her old gloves and then in her very next answer her statement that this was the first time she ever received any gloves from a cashier.

Despite Lee's self-contradictions, the absence of any corroborating evidence, and the extreme improbability of this ninth floor glove incident occurring as Lee described it, the Trial Examiner and the Board credited Lee's testimony concerning the incident and based an unfair labor practice finding, at least in part, upon it. The Trial Examiner stated (R1: 59) that he was "impressed with the completeness" of Lee's testimony concerning the incident. But there is no virtue in completeness if that which is complete is also false. A complete falsehood is no nearer the truth than a vague and incomplete one.

Lee's testimony concerning comparative desirability of jobs as relief operator and steady operator:

Redirect Examination.

"Q. Is there any difference, or what is the difference between steady work on a car and the relief work?

A. **Well, relief work you have a little more time than a regular girl on a car and it is a little more restful than standing on the car steady because going from car to car, that is a little more restful than a steady car.**

* * * * * * *

Q. Is it easier work to run one car all of the time than to be shifting from one car to another?

A. **When a steady operator it is easier to run one car all of the time because you get use to that particular car and you know just about what you can do"** (R2: 74).

Note that Lee testified that relief operating is easier than steadily operating the same car and on the very same page of the record she testified precisely to the contrary.

Lee's testimony concerning nature of her work after returning from leave of absence in April, 1945:

Direct Examination.

"Mr. Carlson: She (Winfield) said after you returned from your leave in January, which would be March, would it not?

A. **After my leave in January, that would have been April.**

Q. (By Mr. Carlson) Her testimony was that you did no relief operating after that time. Is that correct?

A. I did no relief operating after I came back from my leave of absence?

Q. After you came back from your leave of absence, which began in January, 1945, that you were assigned to work as a regular operator upon your return.

A. **No, I differ with her there. I was assigned to a regular car right after the election, the May election. I was assigned to a regular car then.**

Q. In May, 1945?

A. **May, 1945. I was a relief operator up until then.**

Q. **What was your work before the May, 1945, election?**

A. **Relief operator.**

Q. That was the work you were doing prior to your leave of absence in January, 1945?

A. Yes, sir.

Mr. Carlson: That is all.

Cross-Examination.

Q. (By Mr. Burch) **What car were you assigned to when you returned from your leave of absence?**

A. **Car No. 2, Olive Street side.**

Q. **Is that a regular assignment?**

A. That was a regular assignment at that time, yes.

* * * * * * *

Q. You weren't a relief operator at that time?

A. No, I wasn't at that time.

Q. Then you weren't a relief operator after you came back from your leave of absence on April 9, 1945?

A. No, I wasn't a relief operator when I came back. I was on a steady car.

* * * * * * *

Q. From the time you returned from your leave of absence on April 9, 1945, from that time on until your discharge on July 7, you had a regular assignment to a regular car?

A. Yes, sir. Only when a girl was out.

Q. So that you weren't changed after the election of May 21, 1945, were you?

A. Yes, I was changed.

Q. Changed from relief operator?

A. Yes, I was changed from relief operator.

* * * * * * *

Q. You left on your leave of absence January 29, 1945, is that correct?

A. I really don't know the date. It was at the end of January, yes.

Q. And you came back April 9, 1945, is that correct?

A. Yes, sir, I did.

Q. And when you came back you were assigned to Car No. 2 on Olive Street, is that correct?

A. No, I wasn't assigned to Car No. 2 then.

Q. When were you assigned to Car No. 2 on Olive Street?

A. Right after the May election. That was the last of May when I was assigned to this Car No. 2 regularly. As a rule, in the morning we take those cars—the relief operators go on that side and fill out until the girl comes in. When the girls come in we go about our relieving.

Q. When you came back April 9, 1945, what cars did you operate?

A. When I came back——

Q. April 9, 1945.

A. Off of my leave of absence?

Q. Yes, from that time until your discharge what cars did you operate?

A. **I was still relieving in April"** (R2: 168-171).

Redirect Examination.

"Q. (By Mr. Carlson) When you first said you were given a regular car after your leave of absence in January, was that a mistake, in answer to Mr. Burch's question?

A. I said I was given a regular car after the May election.

Q. But prior to that you did say in answer to his question that you were given a regular car after the leave of absence.

A. **If I told him that I was given a regular car after my leave of absence, I made a mistake. In my first statement, you will see I said I was changed to a regular car after the May election"** (R2: 173).

Thus, five or six times Lee stated that she was a relief operator from the time she returned to work after her leave of absence and about three times she stated that she was a steady operator during that period. Again we ask: Which of these sets of answers is the truth? For purposes of credibility it makes little difference which is true. It is noteworthy, however, that Lee's final testimony concerning the matter is in conflict, as we have already noted, with the testimony of McCarthy which was given by way of a recapitulation of the Petitioner's work assignment records which were made from day to day in the normal course of business (R2: 174, 175). McCarthy's testimony, therefore, is entitled to full credibility and Lee's conflicting testimony should, accordingly, be discredited even aside from its self-contradictions. But the Trial Examiner merely mentioned the conflict and then found that Lee's work assignments were made for no

reason other than for the purpose of maintaining operations (R1: 75). He did not mention the evidence as a criterion of credibility.

Lee's testimony concerning retirement fund information:

Direct Examination.

"Q. (By Mr. Carlson) I hand you what has been marked for identification as Board's Exhibit No. 5. I will ask you to state what that is.

A. That is the employees' retirement fund.

Q. Did you receive that from the Respondent?

A. Yes, sir; I did.

Q. When?

A. The Saturday before the 1945 election.

Q. How did you receive it?

A. In the mail.

Q. Do you know whether or not other employees got a similar certificate?

A. Yes, they did" (R2: 34, 35).

Cross-Examination.

"Q. (By Mr. Burch) **Mrs. Lee, you had been told about the pension plan before you received this certificate, had you not?**

A. **No, I had not been told about the pension plan.**

Q. You did not know anything about the pension plan?

A. **No, I had not been told anything about it.**

Q. Had you received a circular telling you about it a month before that?

A. **No, I don't know of any circular.**

Q. Had you ever heard of the plan before you got that certificate?

A. **I think they had something up on the bulletin board about it.**

Q. Did you read it?

A. I did not go into the details of it. I glanced at it and went on.

Q. That was sometime before this, was it not, before you received this certificate?

A. Yes, sir, it was before.

Q. You had known about the pension plan for sometime, had you not?

A. **No, I did not know about it for sometime.**

Q. You knew it from the time you saw it on the bulletin board, is that right?

A. Yes, sir.

Q. Do you know how long that was before you received the certificate?

A. Not very long before I received the certificate.

Q. About how long?

A. **I guess maybe a month.**

Q. And you knew it applied to all employees of the May Department Store Company, did you not?

A. **No, I did not know that it applied to all employees.**

Q. Who did you think it applied to?

A. **I don't know. I received mine, I know that. That information wasn't given out.**

Q. **Do you read 'Store Chat'?**

A. **Yes, I do.**

Q. **Did you read about the pension plan in 'Store Chat'?**

A. **Yes, I read about it in 'Store Chat.'**

Q. But you did not know who it applied to?

A. I did not know who it applied to. I did not go into the details of it.

Q. **You had read about it in 'Store Chat' before you got this certificate, had you not?**

A. **Yes, I read about it before I got the certificate.**

Q. You knew you were under the pension plan, did you not, before you got that certificate?

A. **No, I did not know I was under the pension plan before I got that certificate**" (R2: 38, 39).

McCarthy identified "Respondent's Exhibits 2 and 3" as follows:

"Q. (By Mr. Burch) Mr. McCarthy, what is Store Chat?

A. A weekly publication distributed to all employees of Famous-Barr Company in St. Louis.

Q. I will show you two papers, one marked Respondent's Exhibit No. 2 and the other marked Respondent's Exhibit No. 3, and ask you what they are.

A. **Respondent's Exhibit No. 2 is a copy of the issue dated November 19, 1943, and Respondent's Exhibit No. 3 is a copy of the issue dated December 17, 1943.**

Q. Were they distributed to the employees of the store on or about those dates?

A. Yes, sir.

Mr. Burch: I offer in evidence Respondent's Exhibits Nos. 2 and 3. **The only offer I care to make is the article in each one of them about the Pension Plan.** If it makes a difference I will limit the offer to the one article in each.

Mr. Carlson: **With that limitation, there is no objection.**

Trial Examiner Feiler: There being no objection, they are received for the purpose specified" (R2: 145, 146).

Once more, Lee varied her testimony concerning her information about the Petitioner's retirement fund. She finally wound up with an admission that she had read about the fund in "Store Chat" in issues published as early as November and December, 1943 (Respondent's Exs. 2 and 3, R2: 195-199), in contradiction of her earlier testimony that she knew nothing about the retirement fund until immediately before the election in May 1945.

Lee's testimony concerning alleged surveillance:

Lee testified in support of the allegation of surveillance in the complaint, which the Board dismissed for failure of proof. Her testimony on this subject is equally self-contradictory, but it is too lengthy to permit exact quotation here. It may be summarized as follows:

Lee testified that on June 27, 1945, she went to the store to do some shopping and that upon entering the store at 1:00 P. M. she went to the Accommodation Desk on the Locust Street side to purchase a shopping bag. **On direct examination** Lee testified that she left the Accommodation Desk and made a purchase on the main floor (R2: 16). **On cross-examination** she stated that she went from the Accommodation Desk to the eleventh floor (R2: 48).

On direct examination Lee testified that while making this first purchase on the Main Floor she was greeted by Nolan, who accompanied her from the Main Floor to the Pantry Shelf Department in the Basement expressly to greet Mr. Lee (R2: 16-17). **On cross-examination** Lee stated twice that she returned directly from the eleventh floor to the Pantry Shelf (R2: 48, 49) and that after she rejoined her husband there Nolan walked up and spoke to her (R2: 48).

On direct examination Lee testified that after passing the Bakery Goods counter she accompanied Mr. Lee to the Jewelry Department on the Main Floor, left him there, and went up to the eleventh floor to see Harry Eckstein (R2: 18). **On cross-examination** Lee testified that she did not leave Mr. Lee in the Jewelry Department to go to the eleventh floor, and denied that she had so testified (R2: 49).

On direct examination, Lee testified that she returned to the Jewelry Department from the eleventh floor and there rejoined Mr. Lee, who was buying a wrist watch band (R2: 18, 19). **On cross-examination**, Lee said she stayed with Mr. Lee in the Jewelry Department and that she was there half an hour (R2: 50).

On direct examination, Lee testified that while she and Mr. Lee were in the Jewelry Department she saw Miss

Daniels, another employee, come into the Jewelry Department to the counter next to them (R2: 19). **On cross-examination,** she stated that while she and Mr. Lee were in the Jewelry Department, Mason came over to the Jewelry Department where Lee was and looked at merchandise (R2: 50). Lee testified that she did not see Mason again after leaving the Jewelry Department (R2: 54). She also testified that she saw Mason on the Main Floor Balcony (R2: 53) to which Mr. and Mrs. Lee went after leaving the Jewelry Department (R2: 20).

On direct examination, Lee testified that while she and Mr. Lee were in the Jewelry Department, Daniels came into the department to the counter next to them (R2: 20). **On cross-examination,** she testified that while she and Mr. Lee were in the Jewelry Department, she saw Daniels talking with some other girls in front of the Olive Street elevators (R2: 50).

On direct examination, Lee testified that she left the Main Floor Balcony, returned to the Jewelry Department, and then came back to the Main Floor Balcony (R2: 20). **On cross-examination,** Lee first stated that she did not go back to the Jewelry Department from the Main Floor Balcony (R2: 53) and later she stated that she went back and forth between the two places several times (R2: 53).

To recapitulate briefly Lee's testimony as to June 27, 1945, she testified **on direct examination** that, after leaving the Accommodation Desk and after having visited a department on the Main Floor, the Pantry Shelf in the Basement, the Bakery Goods in the Basement and the Jewelry Department on the Main Floor, she left her husband in the Jewelry Department, went to the eleventh floor to see Eckstein, saw him, returned to the Main Floor to rejoin Mr. Lee in the Jewelry Department—and did

not testify on direct examination to any other trip to the eleventh floor (R2: 16-20). **On cross-examination,** she testified that she went from the Accommodation Desk to the eleventh floor (R2: 48), and twice testified that she returned from the eleventh floor directly to the Pantry Shelf in the Basement (R2: 48, 49). She further testified that she made a second trip from the Main to the eleventh floor (R2: 50) and this second trip was just before leaving the store late in the afternoon (R2: 50). And finally she not only denied that she had gone to the eleventh floor, leaving her husband in the Jewelry Department, but denied that she had previously testified to that effect (R2: 49).

Most of the foregoing examples of the self-impeachment in Lee's testimony contain the very testimony upon which the Board relied in making its findings. But even those which are on relatively unimportant subjects show such unreliability, such lack of veracity, such irresponsibility and such carelessness with the truth, as to deprive the witness of any claim to credibility and to render her testimony on **all** subjects so unreliable that it would not be relied upon by any reasonable person in the conduct of his own affairs. How, then, could her uncorroborated and contradicted testimony be considered to be substantial evidence?

Unless an unfair labor practice finding may be based on an inference from the two facts—union activity and the employer's knowledge of that activity—there is a complete failure of proof that Lee was discharged because of her membership in the Union and her activity in its behalf. The burden was on the Board to sustain its allegations by proof, and that burden was not satisfied by a mere inference, even if there were room for any inference in this case.

In **N. L. R. B. v. Union Mfg. Co.**, 5 Cir., 124 F. 2d 332, an employee with 12 years seniority who had been an active union member for the last several years was discharged for inefficiency and insubordination. The Court said:

> "It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities. The presumption is that the employer has not violated the law, and the burden of proof is not upon the employer, but upon the one who asserts the fact, to prove that the discharge was because of union activities. This burden has not been met, and the Board's findings are not supported by substantial evidence. The petition to enforce the order should be denied."

In **Interlake Iron Corp. v. N. L. R. B.**, 7 Cir., 131 F. 2d 129, l. c. 134, the Court said:

> "The Company does not have to prove non-discrimination because of Union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his Union activities does not shift from the Board."

Certainly, union membership does not carry with it immunity from discharge; and when an employee has been openly active as an actual organizer for a union for a period of more than two years, as had Lee (R2: 33, 41, 42, 147, 148, 153), and during that period has received favors and considerate treatment from her employer, as Lee admitted (R2: 13, 29, 45, 54, 55), it cannot be claimed that her discharge standing alone carries with it an inference that she was discharged because of her membership in and activity in behalf of the union.

The findings of the Board that Petitioner made anti-union statements and that Lee was discriminatorily discharged are wholly unsupported by any substantial evidence in this case. Lee's testimony, which is the only possible support for the findings, is wholly uncorroborated, was given in her own self-interest, and is so completely impeached, so improbable upon its face, and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and, therefore, it does not constitute substantial evidence.

The decision of the court below that "the findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different" is in direct conflict with the decisions of other circuit courts of appeals.

CONCLUSION.

We believe that this case presents important questions of wide public interest which should be decided by this Court. The decision of the court below is in conflict with the controlling decisions of this Court in the **Consolidated Edison Company** case and the **Columbian E. & S. Company** case in that the court below has held that the findings of the Board are conclusive on review regardless of whether or not such findings are supported by substantial evidence.

The decision of the court below is in conflict with the **Administrative Procedure Act**, in that the court below failed to make any determination from the record as a whole on the contention that the findings of the Board are not supported by substantial evidence.

The decision of the court below is in conflict with the decisions of the Circuit Courts of Appeals for the Third,

Fifth, Sixth and Ninth Circuits, in that the court below has held that the findings of the Board upon issues of fact are conclusive on review where they are supported only by the uncorroborated testimony of an interested witness which is so self-impeached, so improbable on its face and so inconsistent, that a reasonable mind could not accept it as adequate to support a conclusion and which, therefore, does not constitute substantial evidence.

It is respectfully submitted that this case should be reviewed by this Court because of the failure of the Court below to follow the controlling decisions of this Court, and the failure of the court below to adhere to the Administrative Procedure Act, and because of the conflict between the decision of the Court below and the decisions of other Circuit Courts of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 316

THE MAY DEPARTMENT STORES COMPANY, A CORPORATION, DOING BUSINESS AS FAMOUS-BARR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R–Supp. 6–11)[1] is reported at 162 F. 2d 247. The findings of

[1] The printed record for purposes of the petition for a writ of certiorari consists of one volume into which have been bound the printed "Record" in the court below which contains the pleadings and the decision and order of the Board (marked "1"), referred to herein as "R–1."; the printed "Portions of Record Printed as an Appendix to Brief of Respondent" in the court below (marked "2"), referred to herein as "R–2."; the printed "Portions of Record Printed as an Appendix to Brief of Petitioner", being the

fact, conclusions of law, and order of the National Labor Relations Board (R–1. 46–85) are reported at 70 N. L. R. B. 94.

JURISDICTION

The decree of the court below was entered on August 4, 1947 (R–Supp. 29–32). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether there is substantial evidence to support the findings of the Board that petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the National Labor Relations Act, and discriminated in regard to the hire and tenure of employment of one employee in violation of Section 8 (3) of that Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 16–17.

STATEMENT

Upon the usual proceedings, the Board, on August 19, 1946, issued its findings of fact, con-

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appendix filed by the Board in the court below (marked "3"), referred to herein as "R–3."; and the proceedings in the court below (not designated by number), referred to herein as "R–Supp."

clusions of law, and order (R–1. 46–84). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:

In 1943 the Elevator Operators and Starters, Local 50E, affiliated with Building Service Employees International Union, affiliated with the American Federation of Labor, hereinafter called the Union, began to solicit members among the Company's elevator service employees (R–1. 55; R–2. 2, 4). On January 28, 1944, on petitions filed by the Union and the C. I. O., the Board conducted an election among the elevator service employees to determine their choice of bargaining representative (R–1. 56; 54 N. L. R. B. 230; 61 N. L. R. B. 258). A majority of the employees voted against representation by any union (R–1. 56; 61 N. L. R. B. 258). The Board thereafter set aside this election because the Company interfered with the employees' freedom of choice (R–1. 56; 61 N. L. R. B. 258). On May 21 and 22, 1945, a second election was conducted among these employees (R–1. 56; 62 N. L. R. B. 1256). A majority of the employees participating in this election voted in favor of representation but neither of the labor organizations obtained a majority vote (R–1. 56; 62 N. L. R. B. 1256). The Board accordingly directed a third election (R–1. 56; 62 N. L. R. B. 1256). Before this election could be held, the Company engaged in various anti-union activities, including the discharge on July 7, 1945,

of Marie Lee, the employee who had appeared in November 1944 in the representation proceeding as a witness on behalf of the Union and had served as an observer for the Union in both the election of January 1944 and the election of May 1945 (R–1. 56, 62, 71; R–2. 3, 6, 7, 24–25, 34, 123, 147, 153). The Board therefore postponed conduct of this election and it had not yet been conducted at the time of the hearing in this case (R–1. 56).

Marie Lee had been employed by the Company as an elevator operator for 16 years at the time of her discharge on July 7, 1945 (R–1. 71; R–2. 3). When the Union began its organizing campaign in 1943, she took a very active part (R–1. 71; R–2. 4, 34). She solicited members and succeeded in securing 30 to 40 signed membership cards from among the approximately 55 employees in the elevator operator service (R–1. 71; R–2. 6). She was the only elevator employee to wear a union button (R–1. 71; R–2. 33, 123). She continued to campaign on behalf of the Union after the first election in January 1944 (R–1. 71; R–2. 7).

For more than a year and a half preceding her discharge Lee had been the target of numerous anti-union statements made by her superior, Mrs. Winfield, supervisor of the elevator service unit (R–1. 56–57; R–2. 3–4, 116, 123). Approximately a month and a half before the election in January 1944, Mrs. Winfield warned Lee that she "was

going to keep on fooling around with the union" until she would be fired (R–1. 57; R–2. 5). Subsequently, on May 25, 1945, three days after the second election, in which Lee had acted as observer for the Union, Mrs. Winfield lectured Lee for some forty-five minutes during working hours. She told Lee that the latter owed her continued employment to Mrs. Winfield, that Mrs. Winfield "knew enough" to have her discharged but that the Company could not "pay" her enough to "sell out" her own people,[2] and that she thought Lee was "more intelligent than that" (R–1. 58; R–2. 8, 9, 70–71). In the same conversation, Mrs. Winfield also complained to Lee that she, Mrs. Winfield, "couldn't handle" Alma Johnson, another elevator operator, since Johnson had, at Lee's instigation, acted as observer for the Union in the second election (R–1. 58, 59; R–2. 9–10). Mrs. Winfield asked Lee to tell Johnson that she, Mrs. Winfield, was her supervisor and not Lee (R–1. 58, 59; R–2. 10).

A day or two after the second election, at the regular morning assembly where the elevator operators were gathered for inspection by their supervisor and for special instructions and assignments (R–1. 57, n. 6; R–3. 6–7), Mrs. Winfield told her whole group of subordinates that the previous evening she had heard a speech by a colored man who had attended the United Nations

[2] All employees in the elevator service unit, including Lee and Winfield, were colored (R–1. 57, n. 7; R–2. 37–38).

Conference at San Francisco. She stated that this speaker had said that colored people were too easily misled and that unions were not good for colored people and "did not do colored people any good at all and we should let them alone" (R–1. 57, 59; R–2. 11–12).

On July 7, 1945, Superintendent of Employment McCarthy summoned Lee to his office and told her that he was discharging her because she had been insubordinate, disobedient and had violated store rules (R–1. 71; R–2. 24–25, 152, 156). He directed her to turn in her uniform and collect her salary check (R–1. 71; R–2. 25). Several days subsequent to Lee's discharge, at the direction of counsel for the Company, each of the elevator operators was called to the Company's executive office and questioned to determine whether Lee had in fact been disrespectful to her superiors and whether she had solicited while at work (R–1. 62–64; R–2. 153–154, 165). On July 31, 1945, Lee sent McCarthy a letter asking for a "complete and detailed statement of the reasons for my discharge" (R–1. 71; R–2. 32, 177). McCarthy replied: "You were discharged * * * for insubordination, disobedience, and repeatedly violating store rules" (R–1. 71–72; R–2. 26–27, 176–177). On August 7, Lee again wrote McCarthy, noting that "the statement submitted by you is vague in that it does not state which store rules, if any, the company alleged were violated by me"; once more she requested a "more specific statement" of the reasons for the discharge

and of the rules she allegedly violated (R–1. 72; R–2. 32–33, 177–178).[3] She received no reply (R–1. 72; R–2. 33).

At the hearing in this proceeding, McCarthy testified that he decided to discharge Lee because of reports that she had engaged in union solicitation during working hours in violation of store rules and because of adverse criticism by her supervisor of her conduct as an employee (R–1. 72; R–2. 148–150). He testified that the first report he received concerning any shortcomings of Lee was that of elevator starter Nolan who on July 3, 1945, informed him that some of the operators had complained to her that Lee had solicited them to join the Union while they were on duty in the store (R–1. 72; R–2. 148, 157). McCarthy further testified that he thereupon interviewed four operators who told him that Lee had solicited them at their elevators, or on her elevator, or in the store building (R–1. 72; R–2. 148–149, 157). Lee denied that she had solicited for the Union during working hours, or in any part of the store other than the locker room (R–1. 72; R–2. 6, 7, 44, 57, 76, 82–83). The operators who were alleged to have complained of her activities during working hours did not testify nor was their failure to testify explained (R.–1. 72). Nor was there

[3] The contrast in literacy between these communications and the oral testimony given by Lee is explained by the fact that she received help in composing the letters (R–2. 40–41).

any evidence that any starter observed Lee engaging in solicitation (R–1. 72). The Board pointed out that in view of the fact that "Operators were not allowed to ride in the regular passenger elevators but were required to use special employee elevators * * * and the manifest difficulty for operators to engage in conversation while taking cars from floor to floor under the supervision of starters," it credited Lee's denial of the charge of solicitation during working hours (R–1. 72–73; R–2. 21, 43–44, 57, R–3. 16).[4]

McCarthy also testified that after he had "pretty much in mind" to suspend Lee for violating the Company's no-solicitation rule, he spoke to Mrs. Winfield about Lee and received from her adverse reports concerning Lee's work and a recommendation that she be discharged (R–1. 73; R–2. 149–150). Thereafter, on July 6, the day before the discharge, McCarthy consulted Mrs. Davis, who acted as supervisor in the absence of Winfield (R–1. 61, 75, 76, n. 30; R–2. 3, 22–23, 150–151, R–3. 6–7, 11, 12–13, 14–15, 19). Mrs. Davis told McCarthy that Lee had not only been disrespectful and insubordinate toward Win-

[4] As the Board pointed out (R–1. 72, n. 29), in an earlier case it had determined that the Company's no-solicitation rule, insofar as it applied to solicitation off the selling floor on the employees' own time was an improper interference with legitimate union activities. *Matter of May Department Stores Co.*, 59 N. L. R. B. 976, 981, enforced, *National Labor Relations Board* v. *May Department Stores Company*, 154 F. 2d 533, 536–537 (C. C. A. 8), certiorari denied, 329 U. S. 725.

field but that, on two occasions, she had also defied Davis' authority (R–1. 75; R–2. 150–152). The alleged incidents took place in May or June 1945. None of them had been reported to McCarthy or the personnel Office until McCarthy asked for information respecting Lee just before her discharge, although Mrs. Winfield testified that it was her practice to submit reports to the Personnel Office "if an operator is disrespectful or insubordinate, or doing something she should not" (R–1. 73–75, 77; R–2. 103, 138, 143). Lee testified that she had not been disrespectful toward her two superiors (R–1. 74; R–2. 56–60). She denied all of the incidents of insubordination attributed to her by Mrs. Winfield and Mrs. Davis (R–1. 74–75; R–2. 9–10, 57–59, 69). With respect to the reports which these two supervisors gave McCarthy the Board found that "their specific charges had little foundation in fact. They did have adverse opinions of Mrs. Lee's work, but it is clear that they had either created or magnified certain incidents to substantiate their subjective evaluations. Furthermore, the findings here demonstrate that Mrs. Winfield had a strong anti-union animus. Mrs. Davis also had indicated her disapproval of the Union * * * these adverse reports concerning Mrs. Lee's work were actuated by anti-union feeling" (R–1. 76). The Board concluded that McCarthy would not have discharged an employee who had given sixteen years of satis-

factory service on so one-sided and unfair an investigation had he not desired to rid himself of an active union adherent (R–1. 76–78).

On the basis of the foregoing facts, the Board concluded that by the anti-union statements of Mrs. Winfield the Company violated Section 8 (1) of the Act (R–1. 47, 56–59) and by its discharge of Lee the Company violated Section 8 (3) of the Act (R–1. 47, 78). Its order directed the Company to cease and desist from its unfair labor practices, to reinstate Lee with back pay and to post appropriate notices (R–1. 50–52).

On December 6, 1946, the Board filed in the court below a petition for enforcement of its order (R–1. 85–90). On June 20, 1947, the court handed down its opinion (R–Supp. 6–11) and on August 4, 1947, entered its decree enforcing the Board's order in full (R–Supp. 29–32).

ARGUMENT

Petitioner's contention (Pet. 15–49) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement, *supra*, pp. 2–9, affords full support for the challenged findings. Petitioner, however, argues that the Court should review the case because the court below by one sentence in its opinion disclosed that it had followed an improper standard of

judicial review (Pet. 5, 6, 7–9, 13, 15–19, 48–49). The opinion of the court below when read in full, however, shows that the court followed the proper standard of review. Thus the opinion states that the hearing before the Board "was largely a contest in veracity between" Lee and Mrs. Winfield (R–Supp. 8). The opinion then sets forth accurately the contention urged by petitioner below and again before this Court (Pet. 5, 8, 13, 14, 21–23, 25, 46, 48, 49), that "Lee's testimony, because of inconsistencies, self-contradictions and improbabilities, did not rise to the dignity of substantial evidence, and that the Court should now rule, as a matter of law, that the Board was precluded from basing any findings upon her testimony" (R–Supp. 8–9). Then the opinion summarizes, first Lee's testimony, then Mrs. Winfield's (R–Supp. 9–10) and concludes that it was properly the Board's function to decide which witness to believe (R–Supp. 10–11). The court adds that "Whatever mistakes the Board may make in appraising the credibility of witnesses and the weight of evidence, and in drawing inferences from conflicting or circumstantial evidence or errors of fact which, like similar errors committed by a jury, are not subject to correction or review" (R–Supp. 11). This we believe is a correct statement of the standard of review here applicable.

Petitioner's assumption that the court below did not consider the record as a whole in deter-

mining whether Lee's testimony was entitled to be considered by the Board as evidence (Pet. 7, 8, 13, 14, 17–19, 48), is belied by the court's summary of the countervailing testimony in the record (R–Supp. 9–10). The opinion makes it clear that the court below looked at the record as a whole in deciding the case. No different standard is imposed by the other statutes which petitioner cites, the Administrative Procedure Act and the Labor-Management Relations Act, 1947 (Pet. 8, 9, 16, 17, 18, 19, 48). The court below in numerous decisions has stated the standard of review which it applies in reviewing Board orders in a manner which shows it was following the standard made explicit by the Administrative Procedure Act and the Labor-Management Relations Act, 1947. Thus in *National Labor Relations Board* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 16, the court below stated:

> It is undoubtedly true that a Board which with "studied design" ignores all the evidence adduced by the employer and views as truthful only the testimony of adverse witnesses, *acts arbitrarily* and not in accord with legal requirements. * * * And Section 10 (e) of the Act, 49 Stat. 453, 29 U. S. C. A., Sec. 160 (e), which provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive," *does not, of course, compel the courts* to accept findings reached

> by accepting evidence presented by one side to the controversy *with total disregard for other worthy evidence* before the Board. *N. L. R. B.* v. *Union Pacific Stages, supra.* [Italics supplied.]

To the same effect, see *National Labor Relations Board* v. *Winona Textile Mills,* 160 F. 2d 201, 208 (C. C. A. 8); *Cupples Co. Mfrs.* v. *National Labor Relations Board,* 106 F. 2d 100, 105 (C. C. A. 8).

The decision of the court below clearly followed the same rule of review as has been stated by this Court and the other circuit courts of appeal in the cases which petitioner relies on as presenting a conflict (Pet. 7–8, 15–16, 18, 20, 23–24, 48).

Nor does the Board's decision in the instant case rest as exclusively on Lee's uncorroborated testimony as petitioner states (Pet. 5, 7, 8, 13, 14, 21). The Board found corroboration in McCarthy's own account of his one-sided and belated investigation into the grounds he assigned for Lee's discharge (R–1. 76–78). It found corroboration in the manner in which Mrs. Winfield and Mrs. Davis resurrected, after McCarthy began to look for reasons to discharge Lee, stale charges of insubordination so trivial in character that they had not even been reported according to the usual routine at the time they occurred (R–1. 74–78). The Board also pointed out that the findings in two earlier cases in which it

found the Company guilty of unfair labor practices and in which the courts enforced its orders[5] "tend to corroborate the findings in the instant case, especially as to the credit to be given McCarthy's testimony and the [Company's] motives in taking certain action" (R–1. 79, n. 33).

Furthermore, a reading of Lee's testimony in full shows that the Board was by no means arbitrary in crediting Lee. The trial examiner, who observed Lee and heard her testify, made a careful analysis of the witness and her testimony and concluded that any inconsistencies in her testimony "were due primarily to her failure to understand certain questions" (R–1. 59, n. 10). He found further that "Lee's testimony * * * was truthful and consistent with the factual background herein" (R–1. 59, n. 10). Although petitioner goes to great length in its petition (Pet. 25–46) to show that this finding was unwarranted, the portions of the testimony upon which it relies, when read in proper context, merely substantiate the trial examiner's evaluation of Lee as a witness. For instance, the portion of the record quoted in the petition at pages 25–26 when read with the immediately preceding testimony (R–2. 4) shows that Lee's so-called contradictory an-

[5] *Matter of May Department Stores Co.*, 53 N. L. R. B. 1366, enforced 146 F. 2d 66 (C. C. A. 8), affirmed, 326 U. S. 376; *Matter of May Department Stores Co.*, 59 N. L. R. B. 976, enforced 154 F. 2d 533 (C. C. A. 8), certiorari denied, 329 U. S. 725.

swers were not in fact such. In other instances Company's counsel confused the witness with misleading questions (see, e. g., R–2. 63–66). In all, Lee's testimony, given for an entire day and covering 171 pages of the transcript, stands virtually unshaken as to all material facts, despite the Company's efforts to confuse and harass her by harping on minor details (see, e. g., R–2. 39–41, 81–82), questioning her about apparent derelictions which the Company never sought to establish as part of its own case (see, e. g., R–2. 42, 43–44, 59–60, 61–63, 79), and seeking to distort her earlier testimony (see, e. g., R–2. 48, 60–61, 80).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER, 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 316.

THE MAY DEPARTMENT STORES COMPANY, a Corporation,
Doing Business as FAMOUS-BARR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A Different Standard of Judicial Review Was Imposed by the Administrative Procedure Act.

The Brief in Opposition, filed for the Board, argues that no different standard of judicial review was imposed by the **Administrative Procedure Act** and the **Labor Management Relations Act, 1947** (Br. 12, 13). This argument of the Board ignores the language of these new acts. For the

purpose of this case the **Administrative Procedure Act** which has been in effect during all the time that this case was pending in the court below is controlling. The similar provisions of the **Labor Management Relations Act, 1947**, enacted June 23, 1947, only add to the general importance of the question presented.

Section 10 (e) of the **Administrative Procedure Act**, 5 U. S. C. 1009 (e), by positive direction requires the reviewing court, where the question is presented, to make a determination as to whether or not agency action, findings and conclusions are supported by substantial evidence, and it directs: "In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party." The Board in arguing that no different standard of judicial review is imposed by that statute, has completely disregarded the intention of Congress.

This language of Section 10 (e) of the **Administrative Procedure Act** first appeared in the draft bill annexed to the minority report of the Attorney General's Committee on Administrative Procedure, in which report by way of explanation it was said:*

> "The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the 'substantial evidence' rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate . . . Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is

*Sen. Doc. No. 8, 77th Cong. 1st Sess., pp. 210-211.

to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions clearly contrary to the manifest weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error."

In an analysis of Section 10 (e) of the **Administrative Procedure Act** by Mr. John Dickinson at an institute conducted by the New York University School of Law on February 1-8, 1947,** it is said:

"In the light of this analysis of the three sentences constituting paragraph (e) which defines the scope of review, it may now be inquired whether the provisions of that paragraph, which are henceforth to be applied in all administrative review proceedings in the Federal courts, make any change in the rules hitherto applied by those courts, first, with respect to review of questions of law, and second, with respect to review of questions of fact. I believe that the conclusion which must be reached after such an inquiry is that properly construed the new statute does make a change in both particulars, and broadens in both instances the scope and measure of the review which the Federal courts are henceforth required to make of administrative action in cases where such action is reviewable at all."

Mr. Dickinson's specific explanation of his reasoning with respect to questions of fact is as follows:

"In the same way that the language of paragraph (e) seems clearly intended to broaden to the extent just indicated the scope of judicial review on ques-

**Federal Administrative Procedure Act And The Administrative Agencies, New York University School of Law Institute—Proceedings, Volume VII, pages 581-589.

tions of law, there is likewise shown by other language of the paragraph a clear intent to broaden similarly the scope of review on questions of fact. It is submitted that no other conclusion can properly follow from the third, or last, sentence of paragraph (e) when read in the light of the legislative history of the act and of the earlier bills which preceded it.

"The relevant language is that the reviewing court, in making its determinations in the enumerated situations where it is under a duty to set aside an administrative finding, 'shall review the whole record or such portions thereof as may be cited by any party.' This language is to be read especially in connection with that part of the previous sentence which lays upon the court the duty of setting aside 'agency action, findings and conclusions . . . unsupported by substantial evidence.' These two parts of the statute when read together sum up into substantially the same result as that contained in the bill of the Acheson Committee minority which required the reviewing court to consider 'findings, inferences or conclusions of fact unsupported, upon the whole record, by substantial evidence'."

After discussing the legislative history and particularly the reports of the Senate and House Committees,† Mr. Dickinson continued as follows:

"Aside from these and similar unmistakable expressions of legislative intent, it seems entirely clear that language which differs as widely as that contained in the last sentence of paragraph (e) from the hitherto accepted formulae for fact review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress by this paragraph to make

†Identical language occurs in both reports, as follows: "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2nd Sess., entitled **"Administrative Procedure Act, Legislative History,"** pp. 214, 280.

no change in existing law but merely to restate it. The existing formulae confine themselves to the requirement either that the finding of the administrative agency shall not be 'unsupported by evidence' or 'shall be supported by substantial evidence.' The Administrative Procedure Act goes further. It does not content itself with a mere restatement of the 'substantial evidence' rule; it adds a novel requirement when it says that the reviewing court in determining whether or not a finding is supported by substantial evidence 'shall review the whole record or such portions thereof as may be cited by any party.' This new and additional language must be given some meaning. What that meaning is should appear without further comment from the history of the various transformations of the review parts of the earlier bills discussed in the first section of this paper.

"In final summary and conclusion, it may be said that if the review provisions of the Administrative Procedure Act are to be construed by the courts in an objective spirit and in such manner as to give effect to their intent and purpose, they should at least produce two results. First, they should make impossible a judicial refusal, as in Dobbson v. Commissioner, to consider independently so-called 'technical' questions of law, and secondly, they should make impossible a judicial failure, as was apparently the case in National Labor Relations Board v. Waterman Steamship Co. and in National Labor Relations Board v. Bradford Dyeing Ass'n, to consider whether opposing evidence destroyed the apparently 'substantial' character of evidence tending to support the administrative determination of fact."

In the Brief in Opposition in this case, the Board seems to argue not so much that there has been no change in the statutory law but, strangely enough in view of the Board's position up to this time, the Board here claims that the courts have always applied the standard which is now required by the **Administrative Procedure Act.** No more

convincing evidence to the contrary need be cited than the opinion in this case where the court below failed to make any determination on the contention that the findings of the Board are not supported by substantial evidence. But the Board states that the court below in other cases has applied the standard of review which is now made explicit by the **Administrative Procedure Act.** It is difficult to understand the Board's reasoning that this act imposed no different standard of judicial review on the assumption that the Board has been able to find three cases in which the Board claims that the court applied the standard which is now required by the Act. But wholly apart from the Board's defective reasoning, the cases cited by the Board do not support the Board's contention and do not apply the standard of judicial review required by the Act.

In **National Labor Relations Board v. Laister-Kauffmann Aircraft Corp.**, 8 Cir., 144 Fed. 2d 9, 16, the court said that the Board may not **with "studied design"** ignore all the evidence adduced by the employer, because to do so would be to act arbitrarily, and the court continued:

> "The Board's decision shows that a careful study of the facts and circumstances and all the testimony was made by the Board, and presents a thoughtful consideration of the credibility of the testimony in question. The Board's conclusion, based on such careful consideration of the character and nature of the testimony and the prejudices, desires and motives of the witnesses, completely refutes any suggestion that the Board acted **with 'studied design'** hostile to respondent in passing on the credibility of the witnesses." (Emphasis supplied.)

All that the court held in that case was that the Board should not "with studied design" ignore the testimony offered by one party. Surely not even the Board intends seriously to contend that this is the limit of the standard

of judicial review required by the **Administrative Procedure Act.**

The case of **National Labor Relations Board v. Winona Textile Mills,** 8 Cir., 160 F. 2d 201, 203, stated the standard of judicial review which the court considered that it was required to apply as follows:

> "In our consideration of the case we are governed by the rule succinctly stated by the Supreme Court in Medo Photo Supply Corporation v. National Labor Relations Board, 321 U. S. 678, 681, 682, 64 S. Ct. 830, 832, 88 L. Ed. 1007, in these words:
>
> "'It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight . . .'"

Can that be the Board's concept of the standard of judicial review now required by the **Administrative Procedure Act?** It is difficult to believe that the Board wishes to be so understood.

In the case of **Cupples Co. Mfrs. v. National Labor Relations Board,** 8 Cir., 106 F. 2d 100, 105, decided in 1939, the court observed that evidence which merely furnishes grounds for suspicion and conjecture proves nothing and that the Board may not disregard uncontradicted testimony of unimpeached and credible witnesses not shaken on cross-examination and not contradicted by any witness, fact or circumstance. This case has no relevancy to the question involved here.

We submit that a different standard of judicial review has been imposed by the **Administrative Procedure Act** of 1946, and that similar provisions contained in the **Labor-Management Relations Act, 1947**, add to the general importance of the question presented.

II.

The Court Below Failed to Apply the Standard of Judicial Review Required by the Administrative Procedure Act, and Failed to Make a Determination From the Whole Record as Required by That Act on the Contention That the Findings of the Board Are Not Supported by Substantial Evidence.

The Board's argument that no different standard of judicial review has been imposed by the **Administrative Procedure Act** is, at least inferentially, a concession that, if a different standard has been imposed by the Act, it was not applied by the court below in this case. As the Board recognizes, the sole question presented to the court below was whether or not the testimony of the witness Lee constitutes substantial evidence to support the Board's order. The court in its opinion stated that was the sole question (R. 8). Nevertheless, the only answer to that question which can be found in the court's opinion is as follows:

> "The findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different" (R. 11).

The Brief in Opposition points out that the opinion below contains a brief summary of the testimony, and from that the Board reasons that the court below must have examined the record. We have no doubt that the court did examine the record, but the opinion contains

no statement or indication that the court below determined that the Board's findings are supported by substantial evidence, or that the court below did more than look in the record to see if some portion of Lee's testimony supported the Board's findings without considering Lee's self-impeachment and inconsistencies. It was the duty of the court under the **Administrative Procedure Act** to make a determination from the whole record as to whether or not the findings of the Board are supported by substantial evidence since that question was presented as the sole issue in the case, and the opinion of the court below fails to indicate that any such determination was made, but on the contrary the opinion shows that the court below considered the Board's findings to be conclusive "no matter how convincing may be the argument that upon the evidence the findings should have been different." It is not enough under the **Administrative Procedure Act** for the reviewing court merely to find that a witness testified to facts which if believed by the Board would support the findings. Under the Act it is the duty of the reviewing court to consider the record as a whole and make a determination as to whether or not the findings are supported by substantial evidence. Such determination as to whether or not there is substantial evidence may not ignore the fact that the testimony upon which the Board relies exclusively for support of its findings is the testimony of an interested witness which is so self-impeached, so improbable upon its face, and so inconsistent that a reasonable mind could not accept it as adequate to support a conclusion and which therefore does not constitute substantial evidence. That was the question presented to the court below, and the court failed to make any determination from the record as a whole but instead held that the findings of the Board are conclusive on review "no matter how convincing may be the argument that upon the evidence

the findings should have been different." That language indicates strongly the court's reluctance in accepting the Board's findings as conclusive and clearly implies, at least, that the court felt that based on the whole record the result should have been different.

III.

The Decision of the Court Below Is in Conflict With the Decisions of Other Circuit Courts of Appeals.

The Petition in this case (pp. 8, 23, 24) points out the conflict between the opinion below and the decisions in the cases of **National Labor Relations Board v. Sun Shipbuilding and Dry Dock Co.**, 3 Cir., 135 F. 2d 15, 25; **Loveman, Joseph and Loeb v. National Labor Relations Board**, 5 Cir., 146 F. 2d 769, 772; **National Labor Relations Board v. Brown Brockmeyer Co.**, 6 Cir., 143 F. 2d 537, 542, and **National Labor Relations Board v. Reeves Rubber Co.**, 9 Cir., 153 F. 2d 340, 342. The Brief in Opposition attempts to brush this conflict aside merely by saying that there is no conflict (Br. p. 13). The conflict is clearly shown by a comparison of the opinion in this case with the cited opinions of other circuit courts of appeals, and the Board's failure to make any effort to explain or reconcile the conflict amounts to a tacit admission that it is unable to do so.

IV.

The Board's Findings Rest Exclusively on Lee's Uncorroborated Testimony.

The Brief in Opposition is filled with inaccurate statements and record references which do not support the statements for which they are cited. We deem it unnecessary at this time to discuss these erroneous factual statements in the Board's brief, except that we should dis-

prove the Board's statement, "Nor does the Board's decision in the instant case rest as exclusively on Lee's uncorroborated testimony as petitioner states" (Br. 13). In an effort to support this statement the Board in its brief claims that it found corroboration "in McCarthy's own account of his one-sided and belated investigation into the grounds he assigned for Lee's discharge (R1: 76-78)." The record reference is to the Intermediate Report of the trial examiner and refers to an additional investigation made by McCarthy after the discharge in response to the Union's request that Lee be reinstated. The trial examiner found that this investigation was an unfair labor practice, but the Board in its decision overruled its trial examiner in this respect (R1: 48, 49). Next the Board states that it found corroboration in the fact that Mrs. Winfield and Mrs. Davis did not complain to McCarthy of Lee's insubordination until McCarthy consulted them with respect to his tentative conclusion that Lee should be suspended temporarily because of her violation of a store rule (Br. 13). But, as the Board itself points out in its brief, Lee testified that Winfield "told Lee that the latter owed her continued employment to Mrs. Winfield, that Mrs. Winfield 'knew enough' to have her discharged, but that the Company could not 'pay' her enough to 'sell out' her own people" (Br. 5). The fact that Winfield and Davis chose to protect a member of their race lends no corroboration to Lee's testimony in this case. Obviously the facts which, according to Lee's testimony, Winfield claimed to be withholding from management must have related to Lee's work and could not have referred to Lee's union activities, because her union activities were known to everyone, including management, for approximately two years prior to that time (R2: 33, 41, 42, 147, 148, 153).

Next the Board says that its findings were corroborated by two earlier cases (Br. 13, 14). As pointed out in the

Petition (pp. 20, 21), both earlier cases involved a CIO union, and in one of them it was held that Petitioner had discriminated against the CIO in **favor of the AFL.** Certainly the decisions in those cases could not corroborate Lee's testimony claimed by the Board to show discrimination **against the AFL.** In fact, they tend to show the contrary.

The foregoing are the only claims made by the Board that there was any corroboration for Lee's testimony in this case. Such claims, even if they were not erroneous, would make a very inadequate showing of corroboration in view of the fact that seven of Lee's co-workers were called by the Board as witnesses in this case and not a single one of them testified to any fact which corroborated Lee's testimony upon which the Board relies, and not a single one of them had ever heard Winfield make any anti-union statement at any time (R2: 88-111). The Board's effort by general statements, wholly unsupported by the record, to lend some substance to the portion of Lee's testimony upon which the Board relies fails completely to answer the specific showing contained in the Petition (pp. 25-46) that Lee's uncorroborated testimony is so self-impeached, so improbable on its face and so inconsistent that a reasonable mind could not accept it as adequate to support a conclusion and, therefore, it does not constitute substantial evidence.

CONCLUSION.

The **Administrative Procedure Act** does impose upon reviewing courts a new and broader standard of judicial review, and the general importance of this question is enhanced by the fact that similar provisions are contained in the **Labor Management Relations Act, 1947.** The Court below failed to apply the standard of review imposed by

the **Administrative Procedure Act**, and failed to make any determination from the record as a whole on the contention that the findings of the Board are not supported by substantial evidence. The decision of the court below is in conflict with controlling decisions of this Court, and is in conflict with the decisions of other circuit courts of appeals.

It is respectfully submitted that this case should be reviewed by this Court because of the general importance of the questions presented.

Respectfully submitted,

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